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Partner and Head of Intellectual Property Litigation Group

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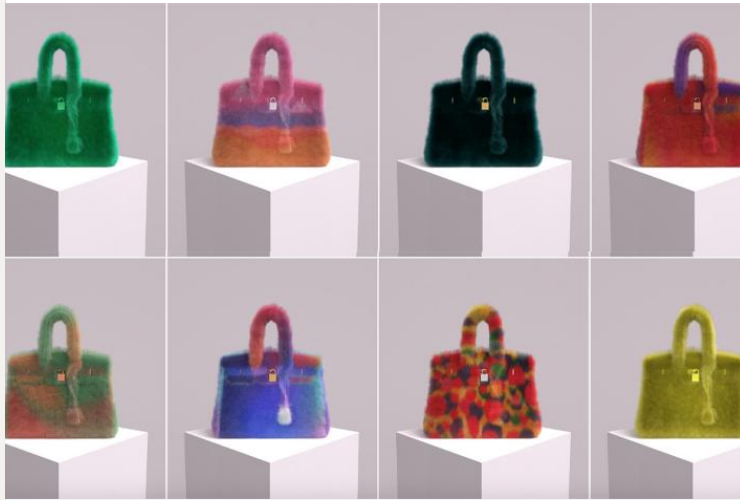
Partner and Head of Intellectual Property Litigation Group

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The MetaBirkins case is likely going to the Second Circuit. As I mentioned to [Law360](#), I expect that court to be far more deferential to the important First Amendment issues at play here than was the district court. Trademark law was not designed to give brand owners the power to stop commentators from talking about brands or to stop artists from depicting brands in their art.

[#metabirkins](#) [#nfts](#) [#firstamendment](#)

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**Jane Kramer** (She/Her) • 3rd+

Creative Solutions Director - UBS Wealth Management USA

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Mr. Bernstein, as a member of the jury I can tell you that the evidence was there about bad faith intent in conjunction with flagrant infringement of the marks and IP. And our instructions from Judge Rakoff were...use Rogers v. Grimaldi to determine if Mr. Rothschild waived his First Amendment protections with this project. We came to the conclusion that he did because of the evidence provided. In addition, we spent a majority of our time discussing the First Amendment and how sacrosanct it is to

our democracy. This was a smart bunch of people I led as foreperson. I personally feel our decision actually protects digital artists in the metaverse and NFT space who use their freedom of expression with the goodwill of the brand and the consumer in mind. If so there is no need to hide under the cloak of the 1st amendment. I wish you well on your case with Nike.

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David Bernstein (He/Him) · Author

9h ...

Partner and Head of Intellectual Property Litigation Group

Jane, I appreciate your post. The issues in this case are fascinating and you had a front row seat. The legal question that the appeals court will address is whether Judge Rakoff was wrong to even let the case go to the jury and whether his instructions were not sufficiently deferential to the First Amendment. ...see more

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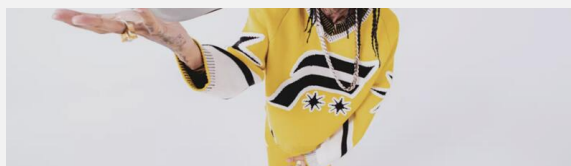


David Bernstein (He/Him) · Author

8h ...

Partner and Head of Intellectual Property Litigation Group

Jane – I'm curious for how you and the jury would have viewed this issue: <https://www.thefashionlaw.com/mschf-vans-argued-wavy-baby-case-in-appeal-to-the-second-circuit/>



MSCHF, Vans Argued Wavy Baby Case in Second Circuit Appeal

[thefashionlaw.com](https://www.thefashionlaw.com)

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Justin Chan · 3rd+

6d ...

Managing Director and Head Legal, Digital Enterprise (Technology, Data, Platform Strategies and Intellectual Property)

David - fascinating. Poor AndyW is spinning in the grave with anticipation. Though I think he was commissioned by Campbells!

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Jane Kramer (She/Her) · 3rd+

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Creative Solutions Director - UBS Wealth Management USA

He wasn't commissioned but they gave their blessing. See even YOU have consumer confusion. lol!

But huge difference from Hermès. Also if you look at an earlier art piece by the same artist called baby Birkin there was no issue. It was the bad faith intent here that was the issue.

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Justin Chan · 3rd+

5d ...

Managing Director and Head Legal, Digital Enterprise (Technology, Data, Platform Strategies and Intellectual Property)

[Jane Kramer](#) you are right! A friend corrected me momentarily after I posted but it's great to always be learning. Thank you Jane and [Leong Kee Poh](#) for keeping me on my toes!

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Dan Rubin (He/Him) · 2nd

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National Business Development Manager at Round Table Group

Great to hear your POV on this important issue, [David](#)! And curious to see how this will fare in the Second Circuit if/when it makes it there.

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Christine Farley (She/Her) · 3rd+


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Professor & Faculty Co-Director, Program on Information Justice & Intellectual Property at American University Washington College of Law

Let's hope!


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